



## THE ADA AMENDMENTS ACT OF 2008

by Patricia W. Goodson

On September 25, 2008, the ADA Amendments Act of 2008 (“ADAAA”) was signed into law by President Bush. The ADAAA makes significant changes to the Americans with Disabilities Act (“ADA”), expanding protections for individuals with disabilities. The ADAAA broadens the definition of disability, rejecting the standards established by the United States Supreme Court. The ADAAA will become effective January 1, 2009.

The ADA prohibits discrimination on the basis of a disability. Prior to the ADAAA, the ADA defined disability as “(A) a physical or mental impairment that substantially limits one or more major life activities; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” The United States Supreme Court has interpreted these terms narrowly. For example, the Supreme Court ruled that when determining the severity of an employee’s condition – and thus whether the employee is disabled and protected by the law – a court must consider whether the employee takes medicine or uses devices (such as eyeglasses or a hearing aid) that improve the employee’s condition. The result has been that many individuals with serious conditions (such as diabetes or epilepsy) who have been able to control or mitigate their conditions with medications have been held not disabled, and thus not protected. In addition, the Supreme Court interpreted “substantially limits” as preventing or severely restricting the individual from doing activities of central importance to daily life.

The ADAAA was enacted in large part in response to these United States Supreme Court cases which Congress viewed as too restrictive. The ADAAA expands the definition of disability, and specifically rejects the Supreme Court cases which narrowed the application of the ADA.

The ADAAA states that primary attention should move to whether entities covered under the ADA have complied with their obligations, not whether an individual is disabled under the Act: “The question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.”

More specifically, the ADAAA broadens the definition of “disability” by newly defining the phrases “major life activities” and “being regarded as having such an impairment.” In addition, the ADAAA sets forth certain rules of construction regarding the definition of “disability.”

**Major Life Activities:** The ADAAA maintains the definition of disability as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual;” however, it broadens the definition of “major life activities.” The ADAAA provides a list of examples of what is considered a major life activity. The list of examples includes: “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.” It also clarifies that a major life activity includes the operation of major bodily functions, such as “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”

**Regarded As:** Under the ADAAA, an individual now meets the requirement of being “regarded as having a disability” if he or she can demonstrate that he has been subject to an action prohibited by the ADA due to a perceived physical or mental impairment, regardless of whether the impairment is perceived to limit a major life

activity. On the other hand, “regarded as” does not apply to impairments that are transitory (actual or expected duration of six months) and minor. In addition, the ADAAA clarifies that employers do not have to provide an accommodation to individuals who are regarded as disabled.

**Rules of Construction:** The ADAAA also sets forth rules of construction regarding the definition of disability:

- The definition of disability is to be construed in favor of broad coverage
- “Substantially limits” is to be construed consistent with the purposes of the ADAAA (discussed more below)
- An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability
- It provides protection for an employee whose condition is periodic or in remission, if the condition would qualify as a disability when it was active
- Whether an impairment substantially limits a major life activity is to be made without regard to ameliorative effects of mitigating measures

The Supreme Court previously held that the terms “substantially” and “major” were to be interpreted strictly, creating a high standard for qualifying as disabled. In doing so, the Court found that to be substantially limited the individual must be prevented or severely restricted from doing activities that are of central importance to most people’s daily lives. The ADAAA specifically rejects this “inappropriately high level of limitation.”

The Supreme Court previously ruled that “mitigating measures” used by an employee factored into determining whether an employee was “disabled.” Under the ADAAA, a determination of whether or not a disability substantially limits a major life activity is to be made without regard to the ameliorative effects of mitigating measures. Examples of mitigating measures include, for example, medication, hearing aids, and low-vision devices. Therefore, an

employer will have to make accommodations for an employee with a disability, regardless of the employee’s use of mitigating measures. The only exception is that the effects of mitigating measures of eyeglasses or contact lenses must be considered in determining whether an impairment substantially limits a major life activity.

The ADAAA also authorizes the Equal Employment Opportunity Commission, the Attorney General, and the Secretary of Transportation to issue regulations implementing the definitions of disability.

The effects of the ADAAA will be that far more individuals will be covered by the ADA. In addition, the ADAAA will make “regarded as” claims even easier. More lawsuits may result from the expanded protection, and these lawsuits may be harder for employers to defend. Employers will need to change the way in which they assess claims of disability, keeping in mind the expansive nature of the ADAAA, in order to avoid lawsuits and claims of discrimination. Although not technically effective until January 1, 2009, it is unclear how this law will affect pending litigation.

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If you have any questions about this client advisory or about how these changes will affect you, please contact Tricia Goodson at (919) 839-0300 or Bill Cary, Nicole Crawford, Liz LaFollette, or Dan McGinn at (336) 373-8850.

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